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Attorneys for Petitioner.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No. 163

NORTHWESTERN PACIFIC RAILROAD COMPANY (a corporation),
Petitioner,

vs.

JOSEPHINE BOBO, as Administratrix of the Estate of Perry E. Bobo, Deceased,
Respondent.

BRIEF FOR RESPONDENT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR RESPONDENT.

The respondent's reply to the brief for petitioner respectfully shows:

The brief in opposition to the petition for writ of certiorari No. 163, October Term, 1933, is adopted as the main brief by this reference, and the present brief is supplementary thereto.

THE PETITIONER IS SEEKING TO HAVE THIS COURT REVISE THE DECISION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN REGARD TO FACTS.

In its opinion the District Court of Appeal concluded that the evidence was reasonably sufficient to show that the condition of the stairway and platform rendered their use unsafe at night, and the physical facts fairly supported the conclusion that the decedent fell therefrom and that his body passed therefrom into the water, and that the facts reasonably presented a case for the jury and that its conclusions are fairly supported by the evidence. (R. 114.)

These conclusions are plainly conclusions of fact. Petitioner now seeks to have this Court examine the facts upon which these conclusions are based. No rule of appellate practice is better settled than the rule that this Court will not determine the accuracy of the facts and that a verdict approved by the lower courts will be accepted as a conclusive finding upon the questions of fact involved.

Southern Pacific Co. v. Bogert, 250 U. S. 483;
Chicago & E. I. R. Co. v. Collins Produce Co., 249 U. S. 186;
El Paso & S. W. R. Co. v. Vizard, 211 U. S. 608.

THE RECORD BEFORE THIS COURT IS INCOMPLETE.

By consent of the parties the jurors were taken to the bridge and had an ocular view of the place of the accident. They had the right to draw their own inferences and conclusions from the facts thus presented to them. What that inspection conveyed to

the minds of the jury can not be known from this record, therefore, this Court can not and does not have the entire record before it. From the physical examination made by the jury at the place of the accident they had the right to resolve against the petitioner the question of negligence and the question of whether or not the negligence of the petitioner was the proximate cause of the death, and by their verdict the jurors have determined that if there had been proper guard-rails on the platform surrounding the steps the decedent would not have fallen off the platform into the water and that the negligence of petitioner was the proximate cause of the death of the decedent.

Massey v. Southern Pacific Co., 70 Cal. App. 77.

Respondent specifically alleged that the decedent slipped from the stairway or platform and was drowned. Evidence was offered in support of the contention of respondent and the weight of it, under the law, was for the jury to determine. The Court should not reverse a judgment because of insufficient evidence to support a finding of fact by the jury based on the evidence and an ocular inspection of the place of the accident, where the question of negligent construction and maintenance thereof was an issue in the case.

Choctaw O. & G. R. Co. v. Holloway, 191 U. S. 334.

SPECIFICATIONS OF ERROR.

Two questions are raised by petitioner: (1) that the evidence is insufficient to show that the death of decedent was proximately caused by any negligence on the part of petitioner; (2) that the evidence shows as a matter of law that decedent assumed the risk of using the stairway and platform of petitioner's bridge in the course of his employment.

THE KIND AND WEIGHT OF THE EVIDENCE IS SUFFICIENT TO SHOW PETITIONER'S NEGLIGENCE WAS THE PROXIMATE CAUSE OF DECEDENT'S DEATH.

Petitioner contends that respondent in this case has charged only two specific acts of negligence, that is, that the steps and platform at the bottom thereof were worn smooth and were slippery when wet; and, that a single handrail only was maintained on each side of the stairway and platform which left sufficient space so that a person falling or slipping on the steps would slide under the handrail into the water. Respondent alleged and proved that the decedent came to his death by drowning, and that the petitioner was negligent in the maintenance of the bridge, steps and approaches thereto, and that the proximate cause of the death of decedent *by drowning* was the negligence of petitioner in the maintenance of the bridge, steps and approaches thereto, together with the failure of petitioner to install a proper guard-rail thereon. IF THERE HAD BEEN A PROPER GUARD-RAIL ON THIS BRIDGE THE DECEDENT WOULD NOT HAVE BEEN PRECIPITATED INTO THE WATER.

The respondent had the right to rely upon any one of the alleged acts of negligence as the proximate cause of the death, or upon all of said acts operating together or concurrently in so causing the damage.

Camozzi v. Colusa Sandstone Co., 26 Cal. App. 74.

A master owes his servants the non-delegable duty to exercise reasonable care to provide a safe place in which to work, which care may not be relaxed, for its exercise is a continuing duty, whenever the circumstances demand it.

Cincinnati N. O. & T. P. Ry. Co. v. Hall, 243 Fed. 76;

Thomas v. Southern Pacific Co., 116 Cal. App. 126 (Cert. denied, 284 U. S. 689).

In furnishing a place wherein to work, the employer must exercise due "care," i. e., care which exigencies of work reasonably demand.

Cole v. Seaboard Airline Ry. Co., 154 S. E. 682 (Cert. denied, 282 U. S. 898).

It is not necessary that there be direct proof of a causal connection between the accident and the negligence charged, it being sufficient if the proven facts and circumstances are such as to justify a reasonable inference that the negligence of the master was the proximate cause of the accident.

Woodward v. Chicago R. I. & P. R. Co., 185 N. W. 978 (Iowa);

Castonia v. Maine Cen. R. R. Co., 100 Atl. 601.

It is not essential that in establishing liability and proving negligence that there must be eye-witnesses

to the transaction to establish such fact, or be direct, for the evidence can be either direct or circumstantial. The respondent assumed the burden of furnishing evidence, but the proof may be either by direct or circumstantial evidence.

Mulligan v. Atlantic Coast Line R. Co., 88 S. E. 446.

The petitioner recites at length the evidence in the case upon which it relies in support of its said contention that the evidence is insufficient to show that the death of decedent was proximately caused by any negligence on the part of petitioner, BUT IT DOES NOT TAKE INTO CONSIDERATION THE EVIDENCE RECEIVED BY THE JURY BY INSPECTION AT THE PLACE OF THE ACCIDENT, OR, THE PRESUMPTION IN THE CASE, because a presumption is evidence and may in certain cases outweigh positive evidence adduced against it.

Smellie v. Southern Pacific Co., 212 Cal. 561;
Fortier v. Hogan, 115 Cal. App. 50.

Pages 1, 2, 3, 4 and a part of 5 of petitioner's brief are concerned with the statement of facts and a large portion of its brief is devoted to an attempt to show wherein the evidence is insufficient to show that the death of decedent was proximately caused by the negligence of petitioner, but nowhere does it point out wherein the deficiency lies—it merely claims that the evidence is insufficient! This is not proper in a brief of this kind and calls for no reply, because, as the District Court of Appeal in this case says:

"Where there is uncertainty as to the existence of negligence, whether such uncertainty arises from a conflict of testimony, or because, the facts

being undisputed, fair-minded men might honestly draw different conclusions therefrom, the question is one of fact for the jury." (R. 114.)

Petitioner also overlooks the fact that inferences naturally drawn from facts which are actually established by proof are entitled to be considered as a part of the evidence. The evidence in the case at bar justified an inference that the deceased had slipped and fallen on the steps which had been permitted to get out of repair, and that the failure of petitioner to place adequate guard-rails on the platform surrounding the steps caused the decedent to slip into the water and come to his death by drowning.

Burks v. A. T. & S. F. R. R. Co., 109 Pac. 1087 (Kansas).

See also:

Looney v. Norfolk & Western, 125 S. E. 262 (Virginia).

THE EVIDENCE DOES NOT SHOW AS A MATTER OF LAW THAT THE DECEDENT ASSUMED THE RISK.

The petitioner contends that the decedent assumed the risk incident to his employment on the bridge, including the use of the stairway and platform in their then condition. The stairway in question contained some 35 steps and was pitched at an angle of 48½° to the horizontal. The vertical distance from one step to the other was 9 inches, and the distance from the back of each step to the front of each step was 8 inches. THE STAIRWAY WAS ON THE OUT-

SIDE OF THE BRIDGE UPRIGHTS AND OVER THE WATER. On the platform at the foot of the steps there was an iron handrail 3 feet and 1 inch above the steps and platform, and there was a space from the bottom of the rail to the platform of approximately 2 feet 10 inches. There was a signal light on the top of the bridge, and NO LIGHT OF ANY KIND ON THE BRIDGE OR STEPS. The stairway was a part of the bridge. The necessity for sound construction and timely inspection in such a structure is far greater in view of its location than an ordinary stairway. Petitioner knew that it was necessary for a bridge tender to move hurriedly up and down the stairway when a boat signaled for the bridge to open and to close the bridge after the boat had proceeded through the draw of the bridge. The testimony discloses that no inspection was ever made of the bridge prior to the happening of the accident. It was the duty of the petitioner to inspect the bridge, yet it contends that it was not dangerous and bases its contention upon the fact that the two bridge tenders testified that there had never been an accident on the bridge. (R. 94 and R. 95.)

In *Alaska Packers Association v. Gover*, 278 Fed. 927, the Court said:

> "A ladder 25 feet long, permanently fixed to the side of a building having rungs nailed in mortises in the perpendicular side pieces, is not a simple tool, risks of defects in which is assumed by a workman required to use it, but a part of the place to work and it is the duty of an employer to exercise reasonable care to see

that it is properly inspected and kept in safe condition."

The question of decedent's knowledge and assumption of risk was properly submitted to the jury.

Kreitzer v. Southern Pacific Co., 38 Cal. App. 654;

McComb v. A. T. & S. F. R. Co., 110 Cal. App. 303.

The burden of sustaining the contention, including the facts of decedent's knowledge and appreciation of the existence of the danger, is upon the petitioner.

Kanawaha & M. R. Co. v. Kerse, 239 U. S. 576.

The burden of proving an employee assumed the risk was upon defendant railroad.

Northwestern Pacific R. R. Co. v. Fiedler, 52 Fed. (2nd), 400;

Pitt v. Southern Pacific Co., 121 Cal. App. 228.

The rule that a railroad employee must look out for himself applies only when the act causing injury was one naturally to be expected.

Kippenbrock v. Wabash R. Co., 194 S. W. 50 (Mo.).

The defense of assumption of risk can not be made where injury occurs by a single act creating a sudden emergency without warning.

Summer v. Ann Arbor R. Co., 209 N. W. 184 (Mich.).

The burden is upon the petitioner to show that the deceased was chargeable with knowledge of the mate-

rial conditions which were the immediate cause of his injury and must establish his appreciation of the danger produced by the abnormal conditions, and that he knew that these conditions endangered his safety. It was for the jury to determine whether deceased's conduct showed mere assumption of risk or contributory negligence.

Great Northern R. Co. v. Knapp, 240 U. S. 466.

The risk which an employee assumes is of two kinds—ordinary and extraordinary. Ordinary risks are those that are normally incident to the occupation in which an employee voluntarily engages. But risks of another sort not naturally incident to the occupation may arise out of the failure of the carrier to exercise due care with respect to providing a safe place to work and suitable and safe appliances for the work. These are known as extraordinary risks. An employee has the right to assume that his employer has exercised due care for his safety. He is not to be treated as assuming these extraordinary risks arising from defects due to the negligence of the employer unless he has *knowledge* of them and the dangers arising therefrom. The knowledge of conditions from which a risk arises which the doctrine calls for is immediate knowledge obtained from pure observation. It does not cover inferences or conclusions therefrom as to the possible, or probable or likely conditions.

In determining the question of assumption of risk, the injured employee will not be presumed to be negligent or to knowingly incur risk or danger of

injury, and this presumption is in itself evidence and may even be sufficient to outweigh positive evidence to the contrary.

Pitt v. Southern Pacific Co., 121 Cal. App. 228;
Hughes v. A. T. & S. F. R. Co., 121 Cal. App. 271;
Blodgett v. Preston, 118 Cal. App. 303.

It is undoubtedly a question of fact whether the employee assumed the risk, even though the evidence is undisputed. It was for the jury to make a proper deduction from the evidence, and as the District Court of Appeal in its opinion says:

> "We are satisfied that the facts reasonably present a case for the jury and that its conclusions are fairly supported by the evidence."
> (R. 114.)

The record does not disclose any evidence whereby petitioner attempted to offer any proof whatever upon the question of extraordinary risks and hazards caused by the master's negligence. It does not raise the defense of assumption of risk in its answer. This may be considered as waived, however, in any event if the defense of assumption of risk may be said to be an issue in this case. There can be no question but that the burden of proof was upon the petitioner and it was not enough for petitioner to attempt to show bare knowledge. In order to raise the question it must go further and show that the decedent knew and appreciated or must be charged with knowledge and appreciation of the hazards. What condition confronted the decedent on the night he came to his

death cannot be known. In determining this question the deceased will not be presumed to be negligent. The matter was submitted to the jury for its decision, and no complaint or claim is made that the instructions of the Court were incorrect.

Both the trial Court and the District Court of Appeal recognize that if assumption of risk by the decedent was made out it would bar recovery under the act. The question was one of fact to be submitted to the jury, and the decision of the jury and the judgment of the three lower Courts based thereon should be binding and determinative of this issue.

CONCLUSION.

It is, therefore, respectfully submitted that the assignments of error by petitioner do not show any repugnancy between the decision of the Court in the case at bar and the applicable decisions of the United States Supreme Court; that there was no denial to the petitioner of any right under the Federal statute because the questions raised by petitioner do not require any interpretation of the Act of Congress by this Court, but were questions of fact which were properly submitted to the jury.

The question of whether there was sufficient evidence to allow the case to be submitted to the jury rests with the trial Court, and every intendment should be indulged in favor of the verdict because the evidence in this case leads to the conclusion that the proximate cause of the death of the decedent w

the negligence of the petitioner and that petitioner failed to establish that the death of decedent by drowning was caused by a risk assumed by said decedent.

Dated, San Francisco, California,
December 1, 1933.

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